IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 3227 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ROHITKUMAR CHIMANLAL PATEL

Versus

GANESH VASUDEV PRAKASHKAR

Appearance:

1. First Appeal No. 3227 of 2004

MR H.S.MULIA for Appellants

MR CHIRAYU A MEHTA for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 27/01/2005

ORAL JUDGEMENT

1. Instant appeal under Section 47 (a) of the Guardians and Wards Act, 1890 ('the Act' for short) is directed against order dated 20.10.2004 rendered in

Miscellaneous Application No.130 of 2004 by the learned Joint District Judge, Vadodara by which the application filed by the appellants under Section 7 of the Act for appointing them as guardian of female minor child "Nisha", daughter of respondents, came to be rejected with no order as to costs.

2. The appellants/applicants who are husband and wife filed the above-numbered Misc. Application before the District Court, Vadodara under Section 7 of the Act seeking the relief of appointing them as guardian of respondents' minor female child, Nisha, inter alia, stating that the appellants are related to the respondents. Appellant No.2 is the real sister of respondent No.2 Minaxiben. The appellants have no child of their own till today and now at this advanced age they have no hope that they will have any child of their own. In these circumstances, the appellants wanted to adopt a child of any one of their relatives and with this intention when they contacted the respondents, they have agreed to give their daughter Nisha in adoption to the appellants. So, to complete the formalities, both the parties i.e., the appellants and the respondents have performed Dutta Homa, necessary Yagna as per Hindu rites and religion with the help of scholar Brahmin priests in presence of relatives, friends and well-wishes on 15.4.2004 at Vadodara and adoption deed has been registered with Sub-Registrar, Vadodara vide Registration No.1654 and thereafter the minor girl is now known as Nisha Rohitkumar Patel. The appellants asserted that they are hailing from noble and cultured family and they are having business and are in sound financial position and they assured that the child Nisha will be brought up in a very good manner and culture. Since the appellants are usually residing at America they will take the child Nisha alongwith them to America and for obtaining/correcting the passport of the Girl child Nisha permission from Court is required and also declaration as guardian for taking the child abroad is necessary and for that purpose the application was made.

3. The learned Joint Distinct Judge while dismissing the application observed that the relief No.1 claimed in the application is for declaring appellant No.1 as adoptive father and guardian of minor Nisha daughter of the respondents. It has also been observed by the learned Joint District Judge that under Section 12 of the Hindu Adoptions and Maintenance Act, 1956 ('the Hindu Adoptions Act' for short) an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes and in instant case the

appellants have already adopted Nisha by registered deed and therefore the appellants are adoptive father and mother of minor Nisha as per the provisions of this Section and held that it is now not necessary to obtain any declaration by the appellants and in case the appellants are in need of any such declaration then they may approach Civil Court for that purpose and the District Court cannot grant such declaration. According to the learned trial Judge, since other reliefs claimed in the applications were of consequential reliefs of relief No.1, those reliefs also cannot be granted and accordingly he rejected the application which has given rise to this appeal.

4. This Court has heard Mr. HS Mulia, learned advocate of the appellants and Mr. Chirayu Mehta, learned advocate of the respondents. This Court has also perused the averments made in the memo of appeal, the Misc. Application filed by the appellants in the trial Court and the impugned order passed therein by the trial Court.

5. The following facts are not disputed by either party:

The appellants are husband and wife. The respondents are also husband and wife. Appellant No.2 is real sister of respondent No.2. Thus the parties are relatives. Nisha is a minor daughter of the respondents. The appellants are above 50 years of age now and have no child of their own till date. The respondents are ready and willing to give the minor girl Nisha in adoption to the appellants. The appellants have adopted the respondents' minor female child Nisha after following Hindu rites on 15.4.2004 and adoption deed has been registered with Sub-Registrar, Vadodara vide Registration No.1654. The respondents have not contested the application filed by the appellants before the trial Court and they have agreed with the contentions made in the Misc. Application by the appellants.

6. In these facts situation, the only question now calls for determination of this Court is as to whether the order passed by the trial Court is justified and what are the powers of the Court under section 7 of the Act. To decide the said question, it would be relevant to refer to section 7 of the Act which reads as under:

"7. Power of the Court to make order as to guardianship.--(1) Where the Court is satisfied that it is for the welfare

of a minor that an order should be made--

(a) appointing a guardian of his person or property or both, or

(b) declaring a person to be such a guardian

the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

7. On having fair look at the aforesaid provision of the Act, it is clear that where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both, or declaring a person to be such a guardian, the Court may make an order accordingly. The learned trial Judge has misdirected himself by observing that the minor girl Nisha has already been adopted by the appellants and hence no declaration can be granted by the District Court and if need be the appellants may approach the Civil Court. According to this Court, the learned trial Judge has erred in making the above observations and also erred in not granting the application.

8. Section 12 of the Hindu Adoptions Act reads as under:

"12. Effects of adoption.-- An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoptive

family;

Provided that--

xxxxx

xxxxx"

In instant case, the appellants have no child and the respondents have no objection in giving away their minor child Nisha to the appellants in adoption. In this appeal the respondents have filed affidavit in reply supporting the claim of the appellants and they asserted that this Court may allow the appeal and according to them Nisha will be having bright future and will have better financial support alongwith her adopted parents. Therefore, it is clear that the learned trial Judge has misinterpreted Section 12 of the Hindu Adoptions Act which has resulted in passing of the order of rejection of the application filed by the appellants before him. In aforesaid view of the matter, this Court is of the opinion that by virtue of the powers conferred under section 7 of the Act, the learned trial Judge ought to have granted the application. Therefore, the impugned order is passed on erroneous construction of the provisions of the Act and the Hindu Adoptions Act. The impugned order is, therefore, required to be quashed and set aside by allowing this appeal and thereby granting the application field by the appellants before the trial Court.

9. For the foregoing reasons, the appeal succeeds and is accordingly allowed with no order as to costs. The impugned order dated 20.10.2004 passed by the learned Joint District Judge, Vadodara in Misc. Application No.130 of 2004 filed by the appellants herein is hereby quashed and set aside and resultantly the application filed by the appellants is accepted. The learned trial Judge is directed to issue certificate in terms of this order and as per the prayers made in the application filed by the appellants before him.

Direct service is permitted.

(A.M. Kapadia, J.)

(karan)